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No. 94-830

In The

Supreme Court of the United States

October Term, 1994

USX CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is a federation consisting of approximately 220,000 companies and several thousand other organizations such as state and local chambers of

[1] This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.2. Letters of consent are being filed simultaneously with the Clerk of Court.

commerce and trade and professional associations. It is the largest association of business and professional organizations in the United States.

A significant aspect of the Chamber's activities involves regular representation of the interests of its member-employers before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs *amicus curiae* in a wide spectrum of labor relations litigation.[2]

This case presents two important and interrelated questions: (1) whether an employer who grants pension credits and payments to former employees on leave to work for a labor organization representing its employees violates Section 302 of the Labor-Management Relations Act ("LMRA"), as amended, 29 U.S.C. § 186; and (2) whether the mere fact of such grants entails criminal liability.[3]

The Court's resolution of these issues is of vital concern to the Chamber and its members, many of whom

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[2] *See, e.g., Livadas v. Bradshaw*, ___ U.S. ___, 114 S.Ct. 2068 (1994); *ABF Freight Syst., Inc. v. NLRB*, ___ U.S. ___, 114 S.Ct. 835 (1994); *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985).

[3] This case also raises the question of whether such former employees who *receive* pension credits and payments from their former employers also engage in criminal conduct under Section 302.

have a long-standing practice of granting pension benefits to former employees who have taken leave to work for labor organizations that represent their employees in collective bargaining. The Circuit Court's incorrect application of Section 302 of the LMRA is likely to chill the continuation of this widespread, and salutary, employer practice. Accordingly, the Chamber submits this brief *amicus curiae* in support of the Petitioner.

PRELIMINARY STATEMENT

In October 1984 – some 10 months after USX and the United Steelworkers of America ("Steelworkers" or "the Union") successfully concluded an agreement that reopened the Company's idled Fairfield Works, located outside of Birmingham, Alabama[4] – USX adopted a resolution changing its leave of absence policy for employees of all its current steel producing operations. The revised policy provided that under certain conditions former USX employees who left the Company's employ to serve as full-time Union officials would be eligible for retroactive leaves of absence of indefinite duration which would render them eligible for accrued pension service credits. The stated reason for the changed policy was that USX believed that it was in its interest that potential plant

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[4] In June of 1982, USX had indefinitely idled the Fairfield plant because of substantial operating losses. After 19 negotiating sessions between USX and the Union, an agreement was reached in late 1983 for the plant's reopening at an ultimate cost to USX of some $200 million.

problems, grievances, and the implementation of collective bargaining agreements be handled by former employees familiar with USX's policies and operations.

In late November 1984, pensions were granted and paid under the changed policy to six Steelworkers International representatives. Included in the grant were two Union officials who had negotiated the Fairfield Works reopening, E.B. Rich and Thermon Phillips, and who had previously been employed at the Fairfield Works. Some five years later, on November 15, 1989, the United States Government brought a 16-count indictment against USX, Rich and Phillips, charging, *inter alia*, that they had criminally violated Section 302.[5]

The indictment originally alleged that USX and negotiators Phillips and Rich engaged in a subterfuge in which USX granted the latter pension credits entitling them to pensions they otherwise would not have received as a "reward" – *i.e.*, a *quid pro quo* – for Phillips and Rich approving and administering the new collective bargaining agreement at USX's Fairfield Work's operation in a manner favorable to USX. Had the case been tried and

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[5] Among other things, Section 302 of the LMRA prohibits an employer from paying any money or other thing of value to officers or employees of a labor organization that represents the employer's employees; it also prohibits such union officers or employees from requesting or receiving any money or other thing of value from any such employer. Section 302(c)(1), however, exempts from the 302 prohibitions payments made to a union officer or employee "who is also an employee or former employee of such employer, as compensation for, *or by reason of*, his service as an employee of such employer" (emphasis added).

decided on this basis, it would have created relatively little consternation in the labor-management community. Instead, during the course of the trial, the district court granted the Government's request to delete the "reward" language from the indictment. As thus changed, the indictment charged only that the pension payments to Phillips and Rich were unlawful because they were paid "not as compensation for or by reason of [either Phillips' or Rich's] service . . . as an employee" of USX Corporation. Moreover, the district court's subsequent jury instructions effectively eliminated the "by reason of" language from the Section 302(c)(1) exemption. Finally, by instructing the jury that the Government was not required to prove that the payments were made or received with "an evil or bad purpose" or even with any "intent to violate the law," the district court, as affirmed by the Eleventh Circuit, essentially ruled that all transgressions of Section 302, no matter how unwitting, were criminal.

REASONS FOR GRANTING THE WRIT

As aptly demonstrated by the Petition for Writ of Certiorari, intolerable uncertainty for employers and union members alike is created by the "patchwork of rights and risks" (Pet. p. 10) that attends the conflict in the holdings among the circuits concerning issues of whether an employer may, without incurring felony liability, grant former employees continuing credit toward company sponsored pensions after they go to work full time for their unions.

I. THE ERRONEOUS DECISION BY THE COURT OF APPEALS WILL DESTABILIZE UNION-MANAGEMENT RELATIONS.

The manner in which this case was prosecuted and the endorsement of that prosecution by both courts below seriously impacts an important aspect of traditional union-management labor relations – the practice of granting pension benefits to employees on union leave. But the matter extends beyond the parameters of the practice involved in this case, for the court of appeals' rulings also cast a cloud over other important and related facets of traditional union-management practices, the so-called "no-docking" practices. Thus, it is a widespread employer-union practice – a practice memorialized in hundreds of collective bargaining agreements – for employees to be granted time off, with pay and without the loss of seniority or benefits, to engage in activities on behalf of their union and their fellow employees. Such leave is frequently granted to union officers or other union officials to enable them to engage in such activities as labor contract negotiations and contract administration, grievance handling, health and safety committee work, administration of welfare and other benefit plans, substance abuse prevention, apprentice training, the administration of job security programs and time studies. These activities may be performed both in-plant and at other locations.

Similarly, collective bargaining agreements frequently provide for the establishment of so-called joint committees, comprised of both management representatives and employee union representatives who are granted time off with pay, benefit and seniority retention.

Functioning on both multi-plant (national) and local plant levels, these committees are assigned objectives such as the improvement of the efficiency of plant operations; the increase of job opportunities; the improvement of product quality; the identification of cost savings; the reduction of employee absenteeism; the improvement of job training programs; the maintenance and improvement of safe and healthful working environments; the assistance of employees in avoiding and recovering from alcoholism and drug dependency; and the furtherance of equal employment opportunity programs.[6]

The Chamber submits that these "no-docking" practices differ from full-time union leave only in degree and not in kind. Indeed, in very large bargaining units governed by mature union contracts, even that difference in degree is sometimes eliminated by the fact that some employees may be "released" for up to 40 hours of union work per week. In essence, then, employees sometimes work full-time on union business while being paid wages and benefits by the employer – a situation that cannot be viewed as any less "pernicious" than the practice of granting pension credit accrual while on extended leaves of absence for full-time union work.

As for the specific practice at issue here, the 1980 Department of Labor Report confirms that numerous

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[6] A 1980 United States Department of Labor Report confirms that numerous employers in the United States allow paid time off for union-related activities. *See Major Collective Bargaining Agreements: Employer Pay and Leave for Union Business*, Bulletin 1425-19, U.S. Department of Labor (Oct. 1980) (hereafter "DOL Report"), pp. 16-17.

employers in the private sector allow employees to take leaves of absence to serve as full-time union officers or staff. *See* DOL Report, pp. 27-29.[7] The large percentage of employers maintaining the practice is also noted in a Bureau of National Affairs study, *Policies on Leave From Work*, Personnel Policies Forum Survey No. 136, Bureau of National Affairs (1983), p. 34. Often the leave that is allowed for full-time service as a union officer is "open-ended" as to duration or for relatively long periods; and when shorter leave periods are granted initially, extensions for additional periods, some quite lengthy, are frequently granted by management. DOL Report, pp. 21-23, 28.

The Department of Labor Report also shows that many employers allow employees on union leave to continue to accrue benefits, including pension benefits. DOL Report, pp. 25-26. *See also Communication Workers of America, AFL-CIO v. Bell Atlantic Network Serv., Inc.*, 670 F.

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[7] The DOL Report states (p. 27):

> Leave of absence clauses pertaining to union employment appeared in 761 of the 1,765 agreements, covering 3.8 million of the nearly 8 million workers. . . . Clauses were found in 62 percent of the manufacturing agreements, and 25 percent of those in nonmanufacturing. Clauses were found in more than 75 percent of the contracts for transportation equipment, non-electrical machinery, utilities, fabricated metal products, ordnance, tobacco, and mining. . . . Provisions were found in 75 percent or more of the agreements held by the Auto Workers, Rubber Workers, Steel Workers, and Machinists agreements, as well as a number of smaller unions such as the Tobacco Workers, Chemical Workers, and Utility Workers.

Supp. 416, 421 (D.D.C. 1987) (observing that full-time union leave benefits had "been included in collective bargaining agreements between the parties for many years, in some instances for three to four decades."). The latter benefits include pension benefits, reduced-premium medical insurance, no-charge life insurance, and discounted telephone services.

The rewards derived from all of these practices are obvious. They further collaborative efforts between employers, unions and employees, and they thereby help to improve productivity, increase efficiency, and reduce labor costs. When former employees represent a union in contract negotiations, they bring to the bargaining table their familiarity with a company's production methods and plant practices, with needed employee skills, and with employee gripes and satisfactions. Such knowledge on the union side helps to minimize irrelevant discussions and unnecessary frictions between the bargainers; it also facilitates the achievement of speedy compromises and realistic solutions to problems. Similarly, when incumbent employees are charged with grievance handling, the processing of meritless complaints can be reduced, employee claims can be pressed forcefully and skillfully, and management can be expected to respond objectively.

Not surprisingly, many of the Chamber's member employers have a long-standing practice of granting pension benefits to former employees who have taken leave to work for labor organizations that represent their employees in collective bargaining. The Chamber endorses the practice and believes that it: (1) advances the interests of employees to engage in self-organization

and to bargain collectively; (2) enhances the efficacy of the collective bargaining process; and (3) promotes the friendly adjustment of industrial disputes concerning employees' wages, hours, and other working conditions. The practice therefore furthers a number of the declared policies underlying the National Labor Relations Act. *See* 29 U.S.C. § 151. The erroneous "criminalization" decision of the Circuit Court inhibits not only the continuation of the practice herein at issue, but also the other traditional, and salutary, union-management practices enumerated above.

II. THE COURT OF APPEALS MISCONSTRUED SECTION 302 OF THE LABOR-MANAGEMENT RELATIONS ACT.

Petitioner, the Chamber believes, was tried and convicted under an erroneous construction and application of Section 302 of the LMRA.

A. The Animating Purpose Of Section 302

Section 302 of the LMRA was enacted into law in 1947. The original Section 302 was introduced on the floor of the Senate as a proposed amendment to a bill under consideration.[8] Senator Ball, who introduced the proposed amendment, described its purpose as follows:

> [T]he pending amendment deals with so called welfare funds, which are becoming increasingly

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[8] The legislative history of Section 302 is described fully in *BASF Wyandotte Corp. v. Local 227, Int'l Chem. Workers Union*, 791 F.2d 1046, 1050-51, 1053 (2d Cir. 1986).

> prominent in negotiations between unions and employers. . . . The sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them, and that they shall not degenerate into bribes. . . .

2 *Legislative History of the Labor-Management Relations Act of 1947* (1948), pp. 1304-05. *See also Arroyo v. United States*, 359 U.S. 419, 425-26 (1959) (observing that Section 302 was enacted because of Congress' concern "with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control."). Moreover, as the Second Circuit has noted, although Section 302 has been amended several times since 1947, in enacting the amendments Congress reaffirmed Section 302's purpose "as the limited one of 'prevent[ing] bribery, extortion, shakedowns, and other corrupt practices. . . . ' [and prohibiting] 'all forms of extortion and bribery in labor-management relations.' " *BASF Wyandotte Corp. v. Local 227*, *supra*, 791 F.2d at 1053, *quoting* H.R. Rep. No. 286, 91st Cong., 1st Sess. 1-2, *and* S. Rep. No. 187, 86th Cong., 1st Sess. 13.

In sum, as the principal legislative purpose underlying Section 302 was to ensure the legitimacy of union welfare funds and to prevent their use as bribes to union officials, it follows that the *per se* construction of Section 302 adopted by the court of appeals – i.e., that a Section 302 violation may be present even in the absence of an

evil intent and even with the elimination of the "reward," or bribe, allegations from the indictment – is inconsistent with that purpose.

B. The Circuit Court's Construction Of Section 302 Does Not Comport With the Underlying Purpose of the Statute.

As we show below, the Circuit Court's restrictive reading of Section 302 is not only erroneous but effectively criminalized a wide range of conduct long considered to be lawful.

1. Although the court below did not refer to the case, its construction of the Section 302(c)(1) exemption is essentially consistent (cf. Pet. pp. 18-19) with the decision of the panel majority in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986). That majority held, in a case involving pension credits to employees on union-related leaves of absence, that the Section 302(c)(1) exemption was applicable "solely to payments made as 'compensation for or by reason of' the . . . *past* services actually rendered by . . . former employees *while they were employees of the company*." *Id.* at 106, 108 (emphasis in original).

Judge Becker's dissent in *Trailways* presents a cogent response to the equally specious construction of Section 302(c)(1) by the court below.[9] Relying on the "by reason of" language in Section 302(c)(1), Judge Becker stated that

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[9] Judge Becker was joined by two other circuit Judges in voting to rehear the *Trailways* case *en banc*. 785 F.2d at 101.

"[c]ontributions made as compensation for services rendered to Trailways simply do not constitute bribery of the Union or any other kind of support of the Union by Trailways," and that "upholding the contributions in this case neither offends the policy of the act nor entails a waiver of strict compliance with the language of § 302." *Id.* at 110.

Judge Becker also found that the cases validating the "no-docking" principle (Section I above) provided "strong support" for the legality of the pension payments. *Id.* He rejected the majority's efforts to distinguish those cases, saying:

> The distinction does not work. . . . During the hours that these persons spent on union activities, they were not rendering services to their employer, and they were not under their employer's control. The distinction between using part of the day for union business and taking leaves of absence to become full-time union officials is only one of degree: the nature of the absences and the payments by the employer during them (or measured by them) is the same.

Id. at 111.

Finally, Judge Becker faulted the majority for not according weight to the widespread nature of the practice involved, finding that the pervasiveness of such practices "provides further reason to believe that the pension contributions at issue here are not illegal and that the dangers the majority alleges are more fictitious than real," and cautioning that the "Court should be reluctant to overturn so widespread a practice, which represents a

practical accommodation agreed upon by both businesses and unions." *Id.*

Prior to 1986, when *Trailways* was decided, the legal authority on the subject had uniformly treated this practice as lawful under Section 302. As early as 1977, the United States Department of Labor had rendered the opinion that Section 302 does not prevent "an employee, who is on leave of absence without pay from a company in order to serve as a union officer, from receiving retirement credit for the period during which he serves as a union official." Opinion Letter dated July 12, 1977, from the DOL's Office of the Solicitor to William N. Wheat and Associates.

Also in 1977, an arbitrator considering the issue held that it was not a violation of Section 302 for an employer to grant "credited service" for pension benefit purposes to an employee who had been on annual leaves of absence for more than 30 years in order to serve as an International Union Representative on a full-time basis. *Monsanto Co.*, 68 Lab. Arb. (BNA) 101, 110, 112-13 (1977).[10] In *Communication Workers of America, AFL-CIO v.*

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[10] In response to the parties' request that he render an opinion on the legality of the practice in question, the arbitrator in *Monsanto* stated:

> In the judgment of the arbitrator, there is no intent manifested in the language of Section 302, to restrict and abolish the almost universal practice of granting leaves of absence to union employees for union business. To so interpret and construe the statute, would be straining the language of Section 302 to an unreasonable, and unwarranted extent. . . .

Bell Atlantic Network Serv., Inc., 670 F. Supp. 416 (D.D.C.), a case decided in 1987, the Court explicitly rejected the reasoning of the *Trailways* majority and its view that Section 302(c)(1)'s "by reason of" language was no broader than the more specific "compensation" language of that provision:

> It is unlikely that Congress intended to be redundant. The fact that the phrase "as compensation for" and "by reason of" are cojoined by the disjunctive "or" usually indicates that the two phrases have different meanings. *See Garcia v. United States*, 469 U.S. 70, 73, 105 S. Ct. 479, 481, 83 L. Ed. 2d 472 (1984) ("canons of construction indicate that terms connection [sic] in the disjunctive . . . be given separate meanings."). Thus, contrary to defendants' urgings, the Court accords independent significance to the meaning of the phrase "or by reason of. . . . "

Id. at 419-20. Accordingly, the court concluded that the union leave benefits at issue did not contravene Section 302's purpose of "prevent[ing] bribery, extortion, shakedown and other corrupt practices." *Id.* at 422-24.

In sum, as the foregoing shows, the restrictive construction of Section 301(c)(1) by the court below is flawed.

> . . . Section 302 of the Taft-Hartley Act, in no manner prohibits, nor was it intended to prohibit the granting of a pension to an employee on approved leave of absence for purpose of serving as a Union International Representative.

68 Lab. Arb. (BNA) at 110, 112.

2. In contrast to Section 302's civil provisions, one of its criminal provisions, Section 302(d)(2), states that "any person who *willfully* violates this Section . . . shall be guilty of a felony." This language, the Chamber submits, refers not to the willful commission of *acts* – here the intentional payment and receipt of pension benefits – but to the willful violation of the *statutory prohibition*, i.e., acting with bad purpose to disobey or disregard the law.

The court of appeals, acting in conflict with the Seventh Circuit's decision in *United States v. Papia*, 910 F.2d 1357 (7th Cir. 1990), determined that the defendants' mere awareness of their actions, as opposed to any evil intent or knowledge of illegality, supplied the requisite *mens rea* under 302(d)(2). The foregoing construction is fallacious for at least three reasons. First, as set forth in Section I, above, the breadth of the Circuit Court's holding reaches a wide range of conduct long considered to be lawful. Accordingly, to permit such conduct to be penalized by felony sanctions absent a showing of an intent to violate the law, or at least a reckless disregard of its duties, runs afoul of this Court's precedent. *See Liparota v. United States*, 471 U.S. 419, 426 (1985). *See also United States v. X-Citement Video, Inc.*, ___ U.S. ___, 1994 WL 662620 (Nov. 29, 1994).

Second, the difficulty that would be encountered in ascertaining whether a benefit payment made by an employer during leave for union service would violate Section 302 mandates against the *per se* criminalization of all such conduct. *See Cheek v. United States*, 498 U.S. 192, 199-200 (1991) (showing of specific intent required where regulatory or statutory context makes "it difficult for the average citizen to know and comprehend the extent of

the duties imposed by the . . . law"); *United States v. Murdock*, 290 U.S. 389 (1933) (same).[11]

Third, it does not necessarily follow from the fact that Congress arguably intended that Section 302 be construed to constitute a *malum prohibitum* offense – as the court of appeals implicitly determined in this case – that the "willfully" provision of § 302(d)(2) should be construed to require only general, rather than specific, intent. *Cf. Morissette v. United States*, 342 U.S. 246, 259-60 (1952). Indeed, it is because many common and innocent practices could run afoul of the statute under a general intent construction that we submit Congress must have intended the willfulness term to require proof of intent to violate, or recklessly disregard, the law.

This Court's reasoning in *Ratzlaf v. United States*, ___ U.S. ___, 114 S.Ct. 655 (1994) – a case involving the statutory prohibition on structuring cash-transactions to avoid federal currency reporting requirements – is

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[11] We note that a criminal violation of Section 302 only arises for a "willful" violation of the Act, whereas no intent requirement is indicated for a civil violation. Such a "two-tiered" liability scheme – with "willful" violations carrying a penalty greater than mere violations – has been interpreted even in the civil context as requiring proof "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute[.]" *Hazen Paper Co. v. Biggens*, ___ U.S. ___, 113 S.Ct. 1701, 1708 (1993) (Age Discrimination in Employment Act), *quoting McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (Fair Labor Standards Act), *and Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 133 (1985) (Title VII of the Civil Rights Act). We submit that the sanctions attending a criminal violation of the law present an even greater reason for requiring proof of actual intent.

instructive in this regard. In *Ratzlaf* as here, the Act imposed criminal penalties upon those who willfully violated the Act. Nonetheless, the Government argued, as the court of appeals reasoned in this case, that no proof of intent to violate the law was required for conviction because the conduct at issue was " 'not the kind of activity that an ordinary person would engage in innocently.' " 114 S.Ct. at 660. After referring to instances in which structuring might occur without unlawful intent, the Court concluded "we are unpersuaded with the argument that structuring is so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of the defendant's knowledge of the illegality of structuring." *Id.* The Chamber submits that the reasoning of *Ratzlaf* applies equally to the employer practices reached by the holding of the court of appeals in this case.

In sum, the Eleventh Circuit's treatment of the "willful" requirement of Section 302(d)(2) is not only erroneous on a practical level, but also runs afoul of *Ratzlaf's* teaching, and, as Petitioner has shown, it is in conflict with rulings of other circuits.

CONCLUSION

For the foregoing reasons, the Chamber urges that the petition for a writ of certiorari be granted.

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